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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE OZIEMKIEWICZ,

Petitioner,

vs.

JANE M. BYRNE, MAYOR OF THE CITY OF CHICAGO, CITY COUNCIL OF THE CITY OF CHICAGO, and RICHARD BRZECZEK, SUPERINTENDENT OF CHICAGO POLICE DEPARTMENT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Is there a liberty interest violation under the Fourteenth Amendment when an employee's personnel file contains "sustained findings" of guilt founded upon a criminal complaint for alleged child abuse which complaint has been nolled by the State of Illinois in the criminal proceedings of the petitioner in the absence of publication by the employer to a third party?

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GEORGE OZIEMKIEWICZ,

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JANE M. BYRNE, MAYOR OF THE CITY OF CHICAGO, CITY COUNCIL OF THE CITY OF CHICAGO, and RICHARD BRZECZEK, SUPERINTENDENT OF CHICAGO POLICE DEPARTMENT,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

On January 11, 1982, the Honorable Milton I. Shadur, of the United States District Court for the Northern District of Illinois, Eastern Division, granted Respondent's Motion to Dismiss Petitioner's Complaint by holding that the Complaint did not allege anything more than a stigma of his termination when Paragraph 13 of his Complaint states:

> That the plaintiff has been deprived of his liberty under the Fourteenth Amendment of the United States Constitution in that his good name, reputation, honesty and integrity have been impaired and that he has been foreclosed from being reemployed by the City of Chicago Police Department and employed by other police departments because of the identified "sustained" findings as stated in the termination letter. . . .

(The decision of the District Court is reprinted herein as Appendix A.)

In connection with Petitioner's Complaint relating to Paragraph 13, the letter of termination dated August 17, 1979 was attached. (Said letter is reprinted herein as Appendix C.)

On August 11, 1983, the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, affirmed the Judgment of the Honorable Milton I. Shadur, by adoption of his opinion *en toto*. (The decision of the Court of Appeals is reprinted herein as Appendix B.)

JURISDICTION

1. The federal question was raised by the petitioner in his complaint for declaratory judgment and other relief that a liberty interest violation occurred when the respondents terminated the petitioner based upon "sustained findings" that he had been arrested and therefore brought discredit upon the department, said arrest related to an alleged criminal charge of child abuse by the petitioner which was subsequently nolled by the State of Illinois in the criminal proceeding involving the petitioner.

2. That the Petition for Writ of Certiorari was filed within 90 days after the entry of the Judgment by the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, on August 11, 1983.

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

That, in 1970, the petitioner was hired by the Chicago Police Department as a radio technician and had been involved in the maintenance and repair at the Chicago Police Department Communication Center, 11th and State, Chicago, Illinois.

That, prior to August 17, 1979, the petitioner had been arrested by the Chicago Police Department in a case filed in the Circuit Court of Cook County, County Department, Juvenile Division, No. 79 JA99709.

That, after the petitioner had been arrested by the Chicago Police Department for the alleged child abuse, he was terminated by the Chicago Police Department on August 17, 1979, without a formal hearing.

That, under the Rules of the Chicago Police Department, the petitioner, as a maintenance and repair technician, did not have a vested property right to a hearing.

That, on October 23, 1979, Edward Rothschild, Assistant State's Attorney for the State of Illinois, nolled the alleged child abuse charge against the petitioner for the following reason:

> "Therefore, it will be motion State nolle. I don't feel even if the facts were stipulated to, that the boy was struck on the buttocks with a broom handle for—as punishment by his father—I think the punishment was reasonable, considering what the boy did and that no harm was done to the child.
>
> Therefore, it is going to be motion State nolle."

That, on March 3, 1981, Judge Ouska granted petitioner's motion to expunge petitioner's arrest record and further granted petitioner's motion requiring the Federal Bureau of Investigation and the Illinois Bureau of Investigation and the Chicago Police Department to surrender his fingerprint records and photographs.

REASONS FOR GRANTING THE WRIT

THAT THERE IS A LIBERTY INTEREST VIOLATION UNDER THE FOURTEENTH AMENDMENT WHEN AN EMPLOYEE'S PERSONNEL FILE CONTAINS "SUSTAINED FINDINGS" OF GUILT FOUNDED UPON A CRIMINAL COMPLAINT FOR ALLEGED CHILD ABUSE WHICH COMPLAINT HAS BEEN NOLLED BY THE STATE OF ILLINOIS IN THE CRIMINAL PROCEEDINGS OF THE PETITIONER IN THE ABSENCE OF PUBLICATION BY THE EMPLOYER TO A THIRD PARTY.

It is the contention of the petitioner that the "sustained findings" of the City of Chicago Police Department supporting the petitioner's dismissal had foreclosed him from not only being re-employed by the City of Chicago Police Department, but further denied him the opportunity from being employed by any other police department, since those "sustained findings" are part of the petitioner's personnel file.

The critical issue is whether those "sustained findings" bar a liberty interest cause of action in that they had not been communicated to a third party by the Chicago Police Department.

From the standpoint of the petitioner he has been foreclosed from re-employment by the City of Chicago Police Department and from applying to any other police department, since those "sustained findings", being part of his personnel file, would be conveyed to any prospective employer (third party), thereby foreclosing him from such future employment.

Such "sustained findings" as found in the petitioner's personnel file, in this instance, require a pretermination hearing, pursuant to *Codd v. Velger*, 525 F.2d 334 (1975),

429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1976) and *Croushorn v. Board of Trustees of the University of Tennessee*, 511 F.Supp. 9 (1980).

Although in *Croushorn*, the case concerned the violation of First Amendment rights, the Court states that false reports in personnel files can be subject to due process claims, as stated on page 41 of that opinion:

> "Apparently if plaintiff were claiming that inclusion of these materials without affording him an opportunity to rebut the charges contained therein violated a property or liberty interest protected by the due process clause, failure to prove the falsity of the statements would be fatal to his case. See, e.g., *Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1976); *Ledford v. DeLanoy*, 612 F.2d 883 (4th Cir. 1980). Plaintiff's claim is not so based. Furthermore, the court believes that due process is not the only constitutional ground upon which one may predicate acclaim seeking expunction of material contained in a personnel file."

Since the Supreme Court in *Codd v. Velger* did not overrule the Appellate Court decision concerning stigmatization in personnel files subject to consent to the release of such information by future employers, the *Croushorn* decision establishes that false information in personnel files can give rise to a due process claim.

As a consequence, the petitioner should have been provided a name clearing hearing in order to dispute the "sustained findings" of the City of Chicago Police Department because of the stigmatization of his good name and reputation relating to the allegation of child abuse in a criminal proceeding wherein there had been no finding of guilt by a subsequent nolling of that alleged child abuse charge by an Assistant State's Attorney of Cook County, Illinois.

CONCLUSION

For the reasons given, this petition should be granted.

Respectfully submitted,

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733
Attorney for Petitioner

November 8, 1983

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE OZIEMKIEWICZ, Plaintiff,

No. 81 C 4615 vs.

JANE M. BYRNE, et al., Defendants.

MEMORANDUM OPINION AND ORDER

George Oziemkiewicz sues Mayor Jane Byrne, Police Superintendent Richard Brzeczek and the Chicago City Council, claiming their failure to provide him a hearing before firing him as a Chicago Police Department employee violated his rights to procedural due process under the Fourteenth Amendment and 42 U.S.C. §1983. Defendants have moved to dismiss the Complaint on several grounds. Because plaintiff has not effectively alleged a protected "liberty" interest entitling him to any sort of pretermination hearing, defendants' motion is granted.

FACTS[1]

Plaintiff was fired August 17, 1979 after nine years as a Police Department maintenance and repair technician. In the formal notice of termination, occasioned by plaintiff's earlier arrest on a charge of child abuse, the Police

[1] For purposes of this opinion the well-pleaded allegations of the Complaint are of course taken as true. No findings of fact are implied by the text recital.

Department said he was being discharged "Inasmuch as you were arrested and brought discredit upon the Department." Two months later a nolle prosequi was entered on the child abuse charge on motion of the State's Attorney. Some sixteen months later, on March 3, 1981 plaintiff's counsel obtained a court order expunging the record of plaintiff's arrest.

PLAINTIFF'S CLAIMED "LIBERTY" INTEREST

Complaint ¶13 expresses the gravamen of plaintiff's claim:

> That the plaintiff has been deprived of his liberty under the Fourteenth Amendment of the United States Constitution in that his good name, reputation, honesty and integrity have been impaired and that he has been foreclosed from being reemployed by the City of Chicago Police Department and employed by other police departments because of the identified "sustained" findings as stated in the termination letter. . . .

Because of the stain on his reputation flowing from the reason for and the fact of his termination, plaintiff argues (Complaint ¶14), defendants violated his due process rights by not giving him a pre-termination "name-clearing hearing to vindicate himself."[2]

But controlling case law makes clear that the stigma of termination does not of itself confer a right to a pre-termination hearing. As *Board of Regents v. Roth*, 408 U.S. 564, 574 n.13 (1972) put it:

> Mere proof, for example, that his record of non-retention in one job, taken alone, might make him somewhat less attractive to some other employers

[2] Both in Complaint ¶1 and in his memorandum opposing the motion, plaintiff specifically disclaims any due process "property" interest in his job.

> would hardly establish the kind of foreclosure of opportunities amounting to deprivation of "liberty."

Plaintiff has really asserted no more than that. No allegation is made that defendants released the facts behind his termination to any third party. Contrast *Larry v. Lawler*, 605 F.2d 954, 957-59 (7th Cir. 1978), in which the plaintiff suffered more than the stigma of being labelled an "alcoholic"—he was also "totally debarred from all federal employment for up to three years" (*id.* at 958). On those facts the Court of Appeals held a protected liberty interest present.[3]

On the Complaint's allegations this case involves no equivalent (or indeed any) disclosure of the reasons for plaintiff's firing. Instead his situation parallels that described in *Bishop v. Wood*, 426 U.S. 341, 348 (1976):

> In [*Roth*] we recognized that the nonretention of an untenured college teacher might make him somewhat less attractive to other employers, but nevertheless concluded that it would stretch the concept too far "to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." [citation omitted] This same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge.

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[3] For the same reason, the only case plaintiff's brief cites as supporting the validity of his claim is inapposite. In *Stanley v. Big Eight Conference*, 463 F. Supp. 920, 924 (W.D. Mo. 1978), the court found that the effect of the defendants' actions regarding plaintiff could well have been to bar plaintiff, a college football coach, from all NCAA college football head coaching jobs. It recognized that injury to reputation alone is not a violation of a liberty interest, but that "some more tangible interest"—like future employment opportunities—must be involved (*id.* at 928). And as in *Larry* the plain thrust of the analysis was that the *fact* of Stanley's termination was equivalent to disclosure of the reasons.

Because plaintiff's Complaint alleges no more than that of the police officer in *Bishop*, it must be dismissed.

CONCLUSION

Defendants' motion is granted. Plaintiff's Complaint is dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a cause of action.

/s/ MILTON I. SHADUR
Milton I. Shadur
United States District Judge

Date: January 11, 1982

APPENDIX B

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Submitted: July 15, 1983*

August 11, 1983.

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge.*
Hon. WILLIAM J. BAUER, *Circuit Judge*

GEORGE OZIEMKIEWICZ,

Plaintiff-Appellant,

No. 82-1231 vs.

JANE M. BYRNE, Mayor of the City of Chicago, CITY COUNCIL OF THE CITY OF CHICAGO and RICHARD BRZECZEK, Superintendent of Chicago Police Department,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 C 4615—**Milton I. Shadur**, *Judge.*

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

ORDER

Plaintiff-appellant brought this § 1983 action against Mayor Byrne, Police Superintendent Richard Brzeczek, and the Chicago City Council, claiming that he was entitled to a "name clearing hearing" prior to the termination of his employment as a maintenance and repair technician for the Chicago Police Department Communication Center. The district court granted defendants' motion to dismiss, concluding that plaintiff had not effectively alleged a protected liberty interest entitling him to such a hearing. Plaintiff appealed. The district court correctly analyzed the single issue presented by the complaint. Accordingly, we affirm its judgment and adopt its memorandum opinion, which is attached.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

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George Oziemkiewicz sues Mayor Jane Byrne, Police Superintendent Richard Brzeczek and the Chicago City Council, claiming their failure to provide him a hearing before firing him as a Chicago Police Department employee violated his rights to procedural due process under the Fourteenth Amendment and 42 U.S.C. §1983. Defendants have moved to dismiss the Complaint on several grounds. Because plaintiff has not effectively alleged a protected "liberty" interest entitling him to any sort of pretermination hearing, defendants' motion is granted.

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Because of the stain on his reputation flowing from the reason for and the fact of his termination, plaintiff argues (Complaint ¶14), defendants violated his due process rights by not giving him a pre-termination "name-clearing hearing to vindicate himself."[2]

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[1] For purposes of this opinion the well-pleaded allegations of the Complaint are of course taken as true. No findings of fact are implied by the text recital.

[2] Both in Complaint ¶1 and in his memorandum opposing the motion, plaintiff specifically disclaims any due process "property" interest in his job.

But controlling case law makes clear that the stigma of termination does not of itself confer a right to a pre-termination hearing. As *Board of Regents v. Roth*, 408 U.S. 564, 574 n.13 (1972) put it:

> Mere proof, for example, that his record of non-retention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to deprivation of "liberty."

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[3] For the same reason, the only case plaintiff's brief cites as supporting the validity of his claim is inapposite. In *Stanley v. Big Eight Conference*, 463 F. Supp. 920, 924 (W.D. Mo. 1978), the court found that the effect of the defendants' actions regarding plaintiff could well have been to bar plaintiff, a college football coach, from all NCAA college football head coaching jobs. It recognized that injury to reputation alone is not a violation of a liberty interest, but that "some more tangible interest"—like future employment opportunities—must be involved (*id.* at 928). And as in *Larry* the plain thrust of the analysis was that the *fact* of Stanley's termination was equivalent to disclosure of the reasons.

> "to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." [citation omitted] This same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge.

Because plaintiff's Complaint alleges no more than that of the police officer in *Bishop*, it must be dismissed.

CONCLUSION

Defendants' motion is granted. Plaintiff's Complaint is dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a cause of action.

/s/ MILTON I. SHADUR
Milton I. Shadur
United States District Judge

Date: January 11, 1982

APPENDIX C

(Letterhead Of)
CITY OF CHICAGO/DEPARTMENT OF POLICE
1121 South State Street
Chicago, Illinois 60605
744-4000

JANE M. BYRNE, *Mayor*
SAMUEL NOLAN, *Acting Superintendent*

17 August 1979

Mr. George Oziemkiewicz
5542 South Sayre
Chicago, Illinois 60638

Dear Mr. Oziemkiewicz:

Based on the "Sustained" findings of the circumstances delineated in C.R.#107359 (violation of Rules 2 and 8—Inasmuch as you were arrested and brought discredit upon the Department) the Chicago Police Department is separating you from the service of the City of Chicago and discharging you as a member of the Chicago Police Department.

This communication is formal notice to you that the Chicago Police Department is effecting formal discharge.

A Department order has been proposed to be effective 18 August 1979.

/s/ JOHN J. THOMAS
Capt. John J. Thomas
Administrator Personnel Services

bb